IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No.

GALLAGHER'S STEAK HOUSE, INC.,

Petitioner,

v.

CHESTER C. BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, *et al.*

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

A.

The Opinions of the Courts Below.

The opinion of the United States Circuit Court of Appeals for the Second Circuit is not yet reported but is set forth on Pages 87-98, inclusive, of the Record. The opinion of the District Court is not reported but appears on Pages 74 to 78 of the Record.

B.

Jurisdiction.

I.

The jurisdiction of this Court is sustained by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, U. S. C. A. Title 28, Section 347 (a).

II.

The date of the order of mandate to be reviewed is May 18th, 1944 ~~(99)~~. R 95

III.

The grounds on which jurisdiction of this Court is invoked are set forth in the petition in the reasons for the allowance of the Writ of Certiorari.

IV.

Statement of the Case.

The case has been stated under heading "Summary and Short Statement of Matter Involved" in the Petition.

Summary of Argument.

The opinion of the District Court merely sets forth that there was but one question to be determined; namely, whether the suspension order was valid, and in holding that it was valid Judge Caffey merely stated that there were decisions sustaining such order and other decisions holding the order invalid, and that he approved of the cases sustaining the order (225 to 227). The opinion of the Circuit Court of Appeals merely held that the power to issue the suspension order had been lawfully delegated and had not been exercised arbitrarily.

Petitioner urges that the determination of the Circuit Court of Appeals is fallacious because:

(1) The delegation by Congress to the President of the powers sets forth in Section 2(a)2 of Title III of the Second War Powers Act is unconstitutional.

(2) The suspension order issued by respondents pursuant to Ration Order 8, is unreasonable in its application

to petitioner. The suspension order provides that until petitioner has paid off his arrears in points, it is unauthorized to buy meats, fats or oils. General Ration Order 5, in Article 7, Sec. 7.3* thereof, provides the means whereby allotments of points are to be granted to restaurants after the initial period. Since petitioner may not secure meats, he may not sell them, and if he does not sell them, he does not establish a business base for application for points, and accordingly, he cannot secure points in the future. Thus, OPA has created a regulation which effectually destroys the business of one suspended and seeks to enforce the said regulation in a manner which would prevent petitioner from bailing itself out or even ever being able to repay arrears.

(3) Since the purpose of the suspension order and said rationing regulation is not reasonably connected with

* The pertinent provisions of Sec. 7.3 are as follows:

"Sec. 7.3 *Computation of meal service allotments for Group III users who charge.* (a) If an institutional user charges for meal services and did charge during the month used in determining his base, his allotment of each rationed food for meal services for his establishments in Group III, is determined by comparing his volume of business during December 1942 with his volume during the preceding period.

(b) If the number of persons served meals during the preceding period is less than twice the number of persons he served meals in December 1942, his allotment of a rationed food for meal services is computed in the following way:

(1) The number of persons he served meals during the preceding period is divided by the number he served meals in December 1942;

(2) The figure so obtained is multiplied by his meal service base for that food;

(3) The result is his allotment for meal services.

(c) If the number of persons he served meals and his dollar revenue from meal services during the preceding period are both more than twice his corresponding figures for December 1942, his allotment of a rationed food for meal services is computed in the following way:

(1) The number of persons served meals during the preceding period is divided by the number he served meals in December 1942;

(2) His dollar revenue from meal services during the preceding period is divided by his dollar revenue from meal services in December 1942;

(3) The smaller of the two figures obtained under (1) and (2) above is multiplied by his meal service base for that food;

(4) The result is his allotment for meal services.

(d) In all other cases, his allotment for meal services is twice his meal service base for each rationed food."

the rationing program, its purpose is penal in nature and is beyond the authority granted to respondents.

(4) Although Judge Chase joined in the unanimous affirmance in the Circuit Court of Appeals, he indicated in the opinion that he expressed his disagreement with the majority of the Court as to the propriety of requiring petitioner to post the prescribed notice in the premises. Petitioner urges that such requirement is not reasonably necessary for the allocation of meats, but is one designed solely to punish petitioner in an authorized manner for past acts or omissions.

ARGUMENT.

POINT I.

The delegation by Congress to the President of the powers set forth in Section 2(a)2 of Title III of the Second War Powers Act is unconstitutional.

In *Steuart* v. *Bowles*, decided by this Court on May 22, 1944, the petitioner had raised no question as to the constitutional authority of Congress to enact Section 2(a)2 of Title III of the Second War Powers Act (56 Stat. 178, 50 U. S. C. App. (Supp. III) Section 633). Petitioner herein urges that said delegation was unconstitutional for it failed to establish clear, definite or sufficient standards to authorize the rules, regulations and ration orders of OPA pursuant to various directives under which OPA acts (*U. S.* v. *Rock Royal Cooperative*, 307 U. S. 533, 574; *Field* v. *Clark*, 143 U. S. 649; *Buttfield* v. *Stranahan*, 192 U. S. 470, 496; *St. Louis Iron Mountain & S. R. Co.* v. *Taylor*, 210 U. S. 281; *Currin* v. *Wallace*, 306 U. S. 1, 15; *U. S.* v. *Grimaud*, 220 U. S. 506; *U. S.* v. *Butler*, 297 U. S. 1; *U. S.* v. *Chemical Foundation*, 272 U. S. 1; *Avent* v. *U. S.*, 266 U. S. 127; *Monongahela Bridge Co.* v. *U. S.*, 216 U. S. 177).

In *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 420, Hughes, C. J., in passing upon this obligation to set up definite criteria in the statute which shall operate as an appropriate standard and guide for executive and administrative action, dealt with this question decisively (pp. 420, 430, 431). There it was said that a general grant of authority to be exercised in "the public good" is insufficient. The cases are reviewed. The Court accepts (p. 426) the distinction made in *Cincinnati W. & Z. R. Co.* v. *Clinton County*, 1 Ohio St. 88, between

> "the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuant of the law".

The Court observes the necessity for establishing "a primary standard" and leaving to the administrator "to fill up the details".

See also *Federal Radio Commission* v. *Nelson Bros. Bond & Mortg. Co.*, 289 U. S. 266, 279, 285.

That we are at war and presented with extraordinary conditions does not afford a reason to supply an omission or to usurp powers not granted by Congress or exercise those which Congress could not constitutionally grant. (*U. S.* v. *Cohen Grocery Co.*, 255 U. S. 81, 88.)

The enactment of Section 2(a)2 of Title III of the Second War Powers Act, as construed by OPA, constitutes a delegation of judicial functions to the Executive or to OPA. That it did not intend to do so is shown by Section 2(a)6 which confers jurisdiction upon the District Courts of the United States over violations of Section 2(a)2 or any rule, regulation, or order or subpoena thereunder and to enforce any liability or duty created by or to enjoin any violation of said subsection (a) etc. It is interesting to

note that defendant Smith admitted that the functions of the Hearing Commissioner and Hearing Administrator were judicial (113).

The suspension order under review has the effect of putting petitioner out of business and thus eliminates it as a dealer for reasons not relevant to the rationing program (*Steuart* v. *Bowles*) and thus deprives petitioner of a property right; namely, the right to do business (*Truax* v. *Corrigan*, 257 U. S. 312, 329) without due process of law.

The respondents herein have assumed power to create by their own regulations the right to act as prosecutor, judge, appeal bureau, and executioner. None of these powers was envisaged by the Second War Powers Act, Title III, Section 2(a)2. Such exercise of power violates fundamental rights. Petitioner complained of this (28) and Judge Chase, in so far as he differed with his associates in the Circuit Court, apparently was of the opinion that there was some misuse of power in this conferrence of power upon themselves by the respondents ~~(98)~~. R 94

POINT II.

Respondents have abused the power to issue suspension orders and have exceeded the limits of the authority granted to them. The suspension of petitioner in the form under review is unreasonable and deprives it of property without due process of law.

Petitioner urges herein that respondents lacked the powers to issue a suspension order, a matter not raised in *Steuart* v. *Bowles*. It further urges that the form of suspension order issued herein is unreasonable insofar as it would compel petitioner to close its doors and does not give petitoner an opportunity to correct a wrong which came about through no wilful act on its part. Thus peti-

tioner has "established that he was eliminated as a dealer or that his quota was cut down for reasons not relevant to allocation * * *" (*Steuart* v. *Bowles*).

The suspension order forbids petitioner's acquiring meats, fats, and oils until its point indebtedness has been fully paid. The only means whereby it may pay its indebtedness is by using points allotted to it for payment thereof instead of for the purpose of securing additional commodities. However, if it does not secure additional meats, fats, and oils, it cannot sell its product to the consuming public and if it does not sell its product, it can not continue to do any business, and it cannot establish a basis for the acquisition of subsequent allotment of points (the effect of Gen. Ration Order 5, Art. 5, Sec. 7.3). If it does not use its points to secure fats and oils, *it cannot even sell non-rationed meats, because fats and oils are necessary for the preparation of palatable food.* Since it would be unable to secure further allotment of points, it would be unable to continue paying off its indebtedness. Thus, the effect of the suspension order would be to put the petitioner out of business, for it would be unable to secure points to bail itself out. Petitioner is caught between the upper millstone of the suspension order and the destructive effect thereof and the lower millstone of Gen. Ration Order No. 5, Art 5, Sec. 7.3 and its power to deprive petitioner of any points whatsoever either to pay back arrears or purchase supplies and thus its property rights are crushed out of existence. Under these circumstances, petitioner respectfully urges that the suspension order is such that its enforcement would be unreasonable and arbitrary and the deprivation of petitioner's property, without due process of law, because putting the petitioner out of business would be a deprivation of a property right. (*Truax* v. *Corrigan*, 257 U. S. 312, 329).

POINT III.

The purpose of the suspension order under review is penal in nature and is therefore, beyond the scope of the authority granted to respondents.

In *Steuart* v. *Bowles*, this Court stated

> "We agree that it is for Congress to prescribe the penalties for the laws which it writes * * * Hence we would have no difficulty in agreeing with petitioner's contention if the issue were whether a suspension order could be used as a means of punishment of an offender."

It is apparent that if the purpose of the suspension order "was relevant to allocation or efficient distribution" (*Steuart* v. *Bowles*) respondents had the power to issue such order. On the other hand, if its purpose has no relevancy to allocation or efficient distribution "quite different considerations would be presented" (*Steuart* v. *Bowles*).

The effect of the suspension order under review is different from the effect of such order in the *Steuart* case. There the ultimate consumer cannot properly receive fuel without surrendering points. In the case at bar the ultimate consumer is not required to surrender points when he dines in a restaurant. Thus if it were reasonable to suspend petitioner, he would receive no meats, but the ultimate consumer would not be denied meats for he could dine across the street or elsewhere without any difficulty. If the ultimate consumer in the *Steuart* case could not secure fuel from Steuart, he, however, could not secure fuel from the dealer across the street unless such consumer had points.

The use of the suspension order in this case does not affect the rationing system one whit.

The effect of the suspension order under review would not be to carry out the ration program effectively but rather would be to punish petitioner by putting it out of business because of past violations. This power Congress did not intend respondent to have. In *Wallace* v. *Cutten*, 298 U. S. 229, this Court had before it the Grain Futures Act (42 Stat. 998, 1001). That act provided that if the Secretary of Agriculture had reason to believe that any person is "violating" any provision of the Act or any rules and regulations made pursuant thereto, he might, after service of complaint and hearing, suspend the violator from trading in Contract Markets. The Secretary of Agriculture caused such a complaint to be served on Cutten. The complaint related solely to *previous* violations. The Court there set aside the order and held that the Secretary of Agriculture was without authority to entertain the complaint on the ground that he could not revoke the right to trade in Contract Markets merely because of past violations of the regulations. There again the Court pointed out that the Grain Futures Act contained penalty provisions. Where the express power to grant and revoke the power of trading is given, the legislative grant of power of revocation is, therefore, strictly construed.

Just as in the *Wallace* v. *Cutten* case, this Court held that the Secretary of Agriculture was without authority to suspend a violator for past acts, so this Court should hold that respondents lacked such power where the sole effect of the suspension is punishment for a past act and is not related to a proper carrying out of the ration program.

POINT IV.

The suspension order improperly requires that petitioner keep posted a notice of suspension at its place of business.

Pursuant to the suspension order, petitioner is required to keep posted at its place of business, until further notice, a notice furnished by respondent, informing the public that petitioner has been prohibited from buying foods as defined in Ration Order No. 16. The requirement that petitioner post said notice is not reasonably necessary for the allocation of commodities, but is designed solely to serve notice upon the public and hold petitioner up to public obloquy. It is like placing petitioner in the stocks. Its apparent purpose, as Judge Chase stated, in his opinion is:

> "* * * both to punish the appellant in an unauthorized manner for past acts or omissions and to implement that other part of the order which forbids the public generally to transfer or deliver rationed commodities to the appellant during the time what is called the suspension order is in effect. If it is valid, it subjects the appellant to civil or criminal action in the courts upon its failure to post the notice, whether the appellant uses the ration points it will receive in the future to pay off its point indebtedness and thereafter to acquire additional rationed commodities, or does without them and makes no use of its points at all. Presumably it was intended to subject any person to civil or criminal liability or both, as a statute might, in the event that the person should deliver rationed commodities to the appellant while the order is in effect. * * *" ~~(97)~~ R94

Judge Chase further stated:

> "* * * Making its premises a billboard on which the public is warned that deliveries of rationed goods

have been forbidden to it until it has made up what has been called a point deficit and has given the agency satisfactory proof to that effect plays no reasonable and necessary, and therefore lawful, part in allocation *per se*. To make changes in an allocation order which experience has shown necessary to conserve food by allocating it fairly among users is a thing apart from the *public branding* of a user who has incurred the displeasure of the allocating agency. Having made a new order of allocation which restricts the appellant's use of points more than did the original the agency must seek enforcement, if necessary, in the courts and not as complainant, judge, jury and executioner when, and as, it sees fit. Only the power to make allocation orders has been lawfully delegated to this agency. Rules, regulations or orders which go beyond that are not authorized by the statute, which is the source of all the power possessed by the appellees. I would see to it that the order was modified accordingly" ~~(98)~~. R 94

Since the requirement that petitioner post the notice (Record p. 30) as modified (104-105) serves no reasonable purpose connected with the rationing program, the Circuit Court of Appeals erred in its affirmance, and this Court should reverse and direct that a temporary injunction issue pending the trial of the issues.

Conclusion.

The petitioner is entitled to have the judgment reversed, the motion for injunction granted, and an opportunity to present its case upon the merits to the District Court.

Respectfully submitted,

MARK EISNER,
Attorney for Petitioner.

No. 1043

In the Supreme Court of the United States

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v.

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The facts of this case are adequately set forth in the opinion of the circuit court of appeals. The principal question involved—that of the validity of suspension orders—has been resolved by this Court's decision in *L. P. Steuart & Bro., Inc.*, v. *Bowles*, No. 793, present Term. The issue of the validity of the Act of Congress conferring the allocation power on the President was not raised by petitioner's complaint and the district court entered no conclusion of law with respect to the matter. The constitutional issue was first presented in petitioner's brief in the circuit court of appeals. The Administrator pointed out in response to this argument that if the constitutional issue had been raised, the single district

judge would have been deprived of jurisdiction under the Act of August 24, 1937, c. 754, § 3, 50 Stat. 752, 28 U. S. C. § 380 (a). Cf. *Wilemon v. Bowles,* No. 854, present Term, certiorari denied, May 22, 1944. The only other issue raised below was whether the allotment of meats, fats, and oils to petitioner by the Office of Price Administration under the formula devised for institutional users of rationed foods was arbitrary. The district court found no basis in the record for a conclusion of arbitrariness and the court of appeals concurred.

There is no basis in fact for a claim, erroneously described as admitted by the Administrator, that the effect of the suspension order would be to put petitioner out of business. Petitioner may continue to sell meats that are ration free, as well as fish and chicken. Almost all fats and oils are likewise ration free and hence may be used by petitioner in cooking. Petitioner's future allotments of ration points are not dependent on the number of customers to whom rationed items are served in a particular period but on the total number of customers served irrespective of the type of purchase. Other "steak houses" which exceeded their ration allotments and overdrew their ration bank accounts, and which were subjected to suspension orders similar to the present one, requiring repayment of past ration indebtedness before additional rationed supplies might be secured, have successfully continued in business. It is therefore feasible for petitioner to

repay its ration indebtedness and establish a basis for future allotments.

It is impossible to follow petitioner's argument that the difference between the suspension order in the *Steuart* case and that in the present case casts doubt on the legality of the latter. In fact the suspension order here involved is of the most moderate and inescapable type in the administration of the allocation power. The suspension order required petitioner to do little more than it was obligated to do under the general Ration Order itself. The Ration Order required surrender of points for meats, fats, and oils and forbade acquisition of any foods covered by the Order until any default was removed.[1] The suspension order in effect restated this provision. In addition petitioner was required by the suspension order to offer proof that its ration-

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[1] Ration Order No. 16, 8 Fed. Reg. 6446, providing for the rationing of meats, fats, and oils, was promulgated on March 20, 1943. During the period of violation herein involved, § 10.5 read, in part:

"*When points must be given up.*—The transferor must get the points from the transferee, and the transferee must give them up, at or before the time when the transfer is made * * *. Where transfer is made by delivery to the transferee (or by shipment by railroad or any other public carrier) the points may be given up later, but not more than seven days after delivery to the transferee. However, a transferee may not accept delivery in this case unless he has points on hand (excluding points not yet surrendered for foods bought or acquired) or in his ration bank account (excluding the amounts of ration checks issued which have not yet been cleared) equal to the point value of the foods transferred. If the transferor does not get the points at or

point indebtedness had been removed, and it was required to post a sign stating that it had been suspended. It is submitted that the latter requirement was a reasonable means of effectuating the suspension order and notifying third parties of its issuance. Petitioner had in the past overdrawn its ration bank account. The posting of the notice of suspension would serve the purpose of informing petitioner's suppliers that it was in default and could not lawfully receive products covered by the Ration Order until the suspension was lifted and the sign removed.

The *Steuart* case disposes of the only issue which would have merited review in the present case. It is therefore submitted that the petition should be denied.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

THOMAS I. EMERSON,
Deputy Administrator,
Office of Price Administration.

JUNE 1944.

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before the time he sends the foods to the transferee, he must, at or before that time, prepare and keep a memorandum showing the name of the transferee, the date he sent the foods, a description of the items, their weight and their point value. If the transferor does not get the points within seven days after delivery, he must immediately notify the district office for the place where the delivery was made, of the default. As long as the transferee is in default, he must not acquire any foods covered by this order, and no transferor who has knowledge of the default may transfer such foods to him."

U. S. GOVERNMENT PRINTING OFFICE: 1944